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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ESTATE OF JANICE D. PITRE,
Petitioner,
v.
WESTERN ELECTRIC COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

Petitioner here seeks review of a decision of the Tenth Circuit that held that the district court had applied the correct standards in computing damages in a class action brought under Title VII of the Civil Rights Act of 1964. Petitioner claims that the Tenth Circuit has adopted a rule that "ambiguities" are to be resolved against Title VII plaintiffs, contrary to this Court's admonitions in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and to the decisions of other courts of appeals.

This claim is meritless. In an earlier decision in this case, the Tenth Circuit *reversed* the district court's initial back pay award on the ground that it did not account for all the effects of the past discrimination and violated the very principles petitioner urges. On remand, the district court considered all the elements of harm in recomputing

damages, and the district court rejected petitioner's and respondent's damages theories on the grounds they would overcompensate or undercompensate the class. In the decision at issue, the Tenth Circuit held that the district court had discharged its "duty to provide compensation equal to the injury," and the Tenth Circuit cited and applied *Albemarle Paper Co.* Pet. App. at 7a.

This decision is simply the correct application of well-settled legal principles to a set of unique facts. The only way petitioner can argue otherwise is by ignoring the prior district court and Tenth Circuit decisions in this case and by misstating the grounds of the decision directly at issue.

1. In its initial liability decision, the district court found that respondent had violated Title VII during the relevant period from December 1974 to December 1980 by discriminating against women in "decisions for promotions, assignments and downgrading." Pet. App. at 136a. In a separate decision, the court awarded the class back pay, front pay and injunctive relief. The court calculated a class-wide award in the following manner. For each year at issue, it multiplied the number of promotions to a given level by the percentage of women in the level immediately below. *Pitre* v. *Western Elec. Co.*, No. 76-218-C2, slip op. at 4 (D. Kan. Dec. 14, 1984). Subtracting the number of women who were actually promoted, the court determined the number of additional promotions women should have received. *Id.* It then calculated the amount of money these additional promotions would have yielded. *Id.* at 5. For each succeeding year, the court adjusted the number of women in the relevant available pool to reflect the additional promotions that should have been made the year before. *Id.* at 4.

Plaintiffs argued that the relevant pool for promotions should include persons in all levels below the level in which the promotion was made, rather than the level immediately below. The district court rejected this claim, finding that "[t]he usual practice was that persons were

to be promoted from one level to the next higher level." *Id.* at 3.

2. On appeal, plaintiffs reiterated their objection to the "next lower grade" pool. The Tenth Circuit rejected the challenge, explaining that evidence that some individuals were promoted more than one level did "not render clearly erroneous the district court's decision to focus on the more common progression in fashioning a remedy." Pet. App. at 102a n.11.

The Tenth Circuit did agree, however, that, in calculating back pay, the district court had failed to account for the lingering effects of pre-1974 discrimination and had erred in attempting to use front pay to remedy an inadequate back pay award. Pet. App. at 101a. Nevertheless, it did not condemn the district court's basic approach to calculating back pay. Instead, it noted that, on remand, the method:

> could again be used. The court must, however, either attempt to account for the effect of past discrimination on the position of women at the beginning of the relevant period or explain why such consideration is unnecessary. Pet. App. at 103a.

3. On remand, the district court accounted for the effects of past discrimination "by developing a hypothetical work force which would have been in place at the end of 1974 if the defendant had not discriminated against women in promotions and downgrades between 1965 and 1974." Pet. App. at 27a-28a. The court approximated the distribution of women and men in the 1965 work force, "then analyzed the promotions and downgrades for each grade in each year, and determined . . . the number which would have gone to women absent discrimination." Pet. App. at 28a. Having thus accounted for past discrimination, the court applied its previously-approved method of calculating back pay for promotions lost during the relevant time period. Pet. App. at 29a.

The court rejected plaintiffs' proposal that back pay be calculated based on the entire difference between the salaries paid to men and women in the relevant levels. The court explained that (Pet App. at 25a):

> [a]t issue in this action are a finite number of identifiable decisions by the defendant regarding promotions and downgrades. We should focus [on] these specific decisions and award the plaintiff damages when there is discrimination, rather than simply determining whether wom[en] received a pro rata portion of all salaries paid.

Finally, the court again rejected plaintiffs' contention that the appropriate pool for promotions to each grade consisted of the employees in all lower grades, rather than those in the next lower grade. Pet. App. at 27a.

4. The Tenth Circuit upheld the back pay award on appeal. It recognized that "the district court's exercise of discretion in awarding back pay must be 'measured against the purposes which inform Title VII,'" and that one purpose is to "make[] 'persons whole for injuries suffered on account of unlawful employment discrimination.'" Pet. App. at 6a (quoting *Albemarle Paper Co.*, 422 U.S. at 417-18). The Tenth Circuit found that the district court's method of computing back pay was "an acceptable approach to the court's duty to provide compensation equal to the injury." Pet. App. at 7a (citing *Albemarle Paper Co.*, 422 U.S. at 418-19). It also held, once again, that "the court's decision to calculate the amount of back pay on a step-by-step basis was not clearly erroneous." *Id.*

5. Petitioner repeatedly claims that the district court made "assumptions" and "resolved ambiguities" in a way that failed to make class members whole and instead gave respondent "the benefit of past discrimination." On the contrary, however, both courts sought to eliminate the lingering effects of past discrimination. The "assumptions" petitioner attacks were factual determinations that the courts relied on in attempting to make the class whole.

a. Petitioner contends that the district court's use of the "next lower grade" in determining the promotions women lost "markedly benefitted the employer" and that this "ambiguity" should have been resolved in plaintiffs' favor. Pet. 9-10. The Tenth Circuit, however, twice upheld the district court's finding that "the more common progression" was for employees to advance one grade at a time. Pet. App. at 102a n.11; see also Pet. App. at 7a. This express factual finding—which is amply supported by the record [1]—takes precedence over a general rule requiring that ambiguities be resolved in favor of Title VII plaintiffs. Indeed, in light of this finding, the district court properly "refused to *assume* . . . that half of all promotions since 1965 would have gone to women." Pet. 23 (emphasis added).[2]

b. Equally baseless is petitioner's claim that the district court incorrectly "assumed" that the class was injured by " 'a finite number of identifiable decisions by the defendant regarding promotions and downgrades.' " Pet. App. at 10. The court focused on these decisions precisely because plaintiffs claimed they were "discriminated against in assignment, promotion, downgrading, or lay-

[1] Petitioner points to 29 multiple-grade promotions between 1965 and 1981. Pet. 9. But, as petitioner elsewhere obliquely acknowledges, there were 140 promotion opportunities between 1965 and 1974 alone.

[2] Petitioner claims that the lower courts' refusal to adopt an assumption of parity creates a circuit conflict. But in *Thompson* v. *Sawyer*, 678 F.2d 257 (D.C. Cir. 1982), the D.C. Circuit did not announce a general rule of parity. Instead, it found such an assumption reasonable because a 1969 Executive Order required the defendant agency "to take affirmative steps to end employment discrimination." *Id.* at 292; *see also McKenzie* v. *Sawyer*, 684 F.2d 62, 78 (D.C. Cir. 1982). In *Hameed* v. *International Association of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506 (8th Cir. 1980), the Eighth Circuit did *not* require the district court to assume that half of all positions would go to class members, but rather required a calculation based on the percentage of class members in the available pool. *Id.* at 520-21.

offs." Pet. 3; see also Pet. App. at 1a (plaintiffs alleged "discrimination with respect to promotions and downgrades"). By creating the hypothetical 1974 work force, the district court adjusted for the fact that discrimination before 1974 exacerbated the economic harm that the chalienged promotion and demotion decisions occasioned.

But the court properly refused to award as back pay the entire salary differential between men and women during the relevant period. Plaintiffs never attempted to show, and could not have shown, that this "earnings gap" resulted from either the challenged promotion and demotion decisions or any pre-1974 discrimination,[3] and the district court made no such finding. The back pay calculation plaintiffs proposed represented an impermissible windfall recovery.[4]

6. Even if the two challenged "assumptions" were incorrect—and they are not—the decisions below raise no issues worthy of this Court's consideration. Neither court held that "ambiguities" in the record were to be resolved in favor of a discriminating employer.[5] To the contrary, the lower courts plainly endeavored to ensure

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[3] A number of factors, most significantly seniority, also accounted for this differential.

[4] *See United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1056 (5th Cir. 1975) (rejecting back pay award based on "indiscriminate . . . wage averaging"), *cert. denied*, 429 U.S. 817 (1976); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 262 n.152 (5th Cir. 1974) (class-wide back pay award must "avoid . . . granting a windfall to the class at the employer's expense"); *see also Hameed*, 637 F.2d at 520 (in calculating class-wide back pay award, court must "estimat[e] the number of apprentice positions that were denied" class members).

[5] In fact, the courts resolved ambiguities adversely to respondent by treating reclassifications and upgrades of previously demoted individuals as promotions and by ignoring the statistical over-promotions of women during the late 1970s. *See* Pet. App. at 26a-27a.

that the lingering effects of pre-1974 discrimination did not limit plaintiffs' recovery.

Moreover, the very cases petitioner cites recognize that district courts "must be granted wide discretion in resolving ambiguities." *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976) (citing *Pettway*, 494 F.2d at 260-61), *cert. denied*, 433 U.S. 919 (1977); *Wells* v. *Meyer's Bakery*, 561 F.2d 1268, 1273 (8th Cir. 1977) (same). No court has suggested that "it is impermissible for a district court or a court of appeals to reject a remedial approach suggested by the injured employees." Pet. 21. Whether, on the unique facts of this case, the district court properly exercised its "wide discretion" here —and respondent submits that the court plainly did—is not a question requiring this Court's review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted.

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